

July 2, 2009

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

*Appeal*

Name of Petitioner: Citizen Action New Mexico

Date of Filing: June 12, 2009

Case Number: TFA-0317

On June 12, 2009, Citizen Action New Mexico (Appellant) filed an Appeal from a determination issued to it on May 11, 2009, by the National Nuclear Security Administration Service Center (NNSA/SC) of the Department of Energy (DOE). In that determination, NNSA/SC responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, NNSA/SC identified and released documents responsive to the Appellant's request. The Appellant challenged the adequacy of NNSA/SC's search for documents. This appeal, if granted, would require NNSA/SC to conduct a further search for responsive documents.

*I. Background*

On September 8, 2008, the Appellant requested 24 items regarding Building 807 at Sandia National Laboratories (SNL). Request dated September 8, 2008, from David McCoy, Appellant, to NNSA/SC. Relevant to this Appeal, the Appellant requested that NNSA/SC:

17. Provide the specific articles from the Sandia Lab News and the Sandia Daily News Bulletin that discuss Buildings 805, 807 and/or 807 in any manner including, but not limited to employee sickness, employee concerns, SNL or Contractor plans, studies, tests and results thereof, and demolition.
18. Provide any documents that show how employee sickness absences are accumulated, referenced, complied, summarized, and reported.

19. Provide any aggregate reports of employee sickness absences for Building 807 by year from 1990 to 2008.

20. Provide any aggregate reports of employee sickness absences for all buildings in Technical Area 1.

21. Provide any information or reports where employee deaths are accumulated, referenced, compiled, summarized, and/or reported. Provide the period for which these records exist and have been accumulated and/or maintained. Provide these reports for both active employees and retired employees at SNL for the period 1990-2008. Provide all documentation to show any records that have been archived at any location by SNL. Provide where possible employee age and cause of death.

22. Provide any documents that identify any buildings at SNL, other than Building 807, that have been identified as having "sick-building syndrome" or having a higher incidence of employee sickness absence and or employee death than the average rates for SNL employees.

*Id.* at 2. On May 11, 2009, NNSA/SC released documents responsive to requests 1-9, 12, 14, 15, 17, and 24 to the Appellant. NNSA/SC redacted portions of some of the documents, contending that the redacted information was exempt from disclosure under FOIA Exemption 6.<sup>1/</sup> Determination Letter dated May 11, 2009, at 1-5 from Carolyn Becknell, FOIA Officer, NNSA/SC, to Appellant (Determination Letter). In addition, NNSA/SC indicated that the information responsive to requests 10, 11, 12, and 16 was publicly available.<sup>2/</sup> *Id.* at 2-3. Also, NNSA/SC indicated that the documents responsive to requests 18-22 were contractor, *i.e.*, Sandia Corporation (Sandia), records, which are in the possession and control of the contractor. *Id.* at 4. Finally, NNSA/SC found no documents responsive to requests 13 and 23.<sup>3/</sup> *Id.* at 3, 4-5.

On June 12, 2009, the Appellant appealed, challenging the adequacy of NNSA/SC's search for responsive documents. With regard to request 17, the Appellant claims that a former Sandia employee stated there was additional information which had not been provided to the Appellant. Appeal Letter at 1 dated June 12, 2009, from Appellant to Director, Office of Hearings and Appeals (OHA).

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<sup>1/</sup> The Appellant is not challenging the withholdings made under Exemption 6.

<sup>2/</sup> The Appellant is not challenging this response by NNSA/SC.

<sup>3/</sup> The Appellant is not challenging this response by NNSA/SC.

Regarding requests 18 to 22, the Appellant claims that the information it is requesting is “directly related to federal [DOE] activities at [SNL] as carried out by the DOE and its contractor. Therefore, [the Appellant’s] request indisputably concerns ‘the operations or activities of the government.’” *Id.* at 2. As support for its response to NNSA/SC’s claim that the documents it is requesting are contractor records, the Appellant argues: (1) that DOE is dodging the question of whether responsive information is in its possession by asserting contractual reasons for not releasing the information; (2) that NNSA/SC has not stated a recognizable FOIA exemption for withholding the documents and reliance on such exemptions are discretionary, not mandatory; (3) that “[d]ocuments that result from *accumulating, referencing, compiling, summarizing, and reporting* health and safety data about sickness and absences would be documents in the possession and control of DOE;” (4) that Sandia regularly releases health and safety data in the *Sandia Lab News* for dissemination to the general public regarding sickness and deaths of Sandia workers; (5) lumping together both the DOE and Sandia as one entity, that the “compilation and reporting of employee absence, sickness and deaths records can[not] reasonably be withheld for contractual reasons given that Sandia is distributing such information to the wide public;” (6) that DOE Orders require DOE to evaluate hazards in the workplace and protect workers. *Id.* at 2-3.

## II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). “The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).<sup>4/</sup>

We contacted NNSA/SC to determine what type of search was conducted. In response to request 17, NNSA/SC indicated that “the Sandia Lab News and the Sandia News conducted a computer search using search engines and inputting key terms for information noted in [the request] pertaining to Buildings 805, 806, and 807.” E-mail dated June 24, 2009, from Karen Laney, NNSA/SC, to Janet R. H. Fishman, OHA (June 24, 2009, E-mail). NNSA/SC searched in the areas most likely to have the requested information. NNSA/SC is required to conduct a search that is reasonably calculated to uncover the requested

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<sup>4/</sup> All OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

information. NNSA/SC is not required to conduct an exhaustive search. NNSA/SC enclosed copies of two articles from the *Sandia Lab News* and sent the results of the search of the *Sandia Daily News*. We believe the search that NNSA/SC conducted was reasonably calculated to uncover the requested information in those offices.

As to the Appellant's claims that NNSA/SC must have documents responsive to requests 18 to 22, NNSA/SC stated that it interpreted the request too narrowly. After reviewing the information provided in the Appeal, NNSA/SC determined that it does have responsive records. June 24, 2009, E-mail. NNSA/SC is rescinding the original determination in regard to requests 18 to 22 and will issue a new response to the Appellant. Therefore, we will dismiss this portion of the Appeal.

### *III. Conclusion*

The search conducted by NNSA/SC in regard to request 17 was reasonably calculated to uncover all documents responsive to the Appellant's request. Accordingly, this aspect of its Appeal will be denied. The NNSA/SC has determined that it interpreted requests 18 to 22 too narrowly and it will issue a new determination regarding those requests. Therefore, we will dismiss the Appeal as it pertains to these requests.

It Is Therefore Ordered That:

- (1) The Appeal filed by Citizen Action New Mexico, Case No. TFA-0317, is hereby denied in regard to request 17.
- (2) The Appeal filed by Citizen Action New Mexico, Case No. TFA-0317, is hereby dismissed in regard to requests 18 to 22, concerning which NNSA/SC will issue a new determination.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: July 2, 2009